

THE HONORABLE JAMES L. ROBART

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

KATHERINE MOUSSOURIS, HOLLY
MUENCHOW, and DANA PIERMARINI,
on behalf of themselves and a class of
those similarly situated,

Plaintiffs,

v.

MICROSOFT CORPORATION,

Defendant.

Case No. 2:15-cv-01483-JLR

**PLAINTIFFS' REPLY RE MOTION TO
SEAL**

NOTE ON MOTION CALENDAR:
DECEMBER 15, 2017

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1 **I. INTRODUCTION**

2 Pursuant to the Court's order entered at Dkt. 275, Plaintiffs submit this Reply brief to the
 3 Motion to Seal filed with Plaintiffs' Motion for Class Certification. *See* Dkt. 227. As previously
 4 noted, Plaintiffs filed substantial judicial records¹ under seal because Microsoft had designated
 5 the materials as "Confidential" or "Highly Confidential," but Plaintiffs disputed that sealing is
 6 appropriate. *Id.* On November 29, 2017, Microsoft filed its Response to the Motion to Seal with
 7 a proposed sealing plan. Dkt. 269. Notably, Microsoft's Response asserted the wrong legal
 8 standard for sealing here, arguing that Microsoft only need meet the "good cause" standard. *Id.*
 9 at 2. In fact, last year the Ninth Circuit rejected the "good cause" standard for any motion more
 10 than tangentially related to the merits, adopting the "compelling reasons" standard instead.²
 11 Plaintiffs respectfully submit that Microsoft is not able to satisfy the compelling reasons standard
 12 for any of the three areas of dispute concerning sealing.³

13 *First*, Microsoft seeks to seal the number of internal complaints of gender discrimination
 14 lodged during the class period, as well as the number of such complaints that the company found
 15 substantiated, without providing evidence of potential harm or any argument at all as to why the
 16 numbers should be redacted. *Second*, Microsoft has failed to provide compelling reasons to seal
 17 human resources communications reflecting the shortcomings of its diversity and inclusion
 18 programs. While these materials may be embarrassing for Microsoft, embarrassment is not a
 19 compelling reason to justify sealing of judicial records. *Third*, Microsoft has sought to seal the
 20 OFCCP's Notices of Violation to Microsoft even though it is already public knowledge that the
 21 OFCCP has issued these Notices to Microsoft for gender discrimination. Microsoft seeks to seal
 22 the details of the OFCCP's investigation and findings, which are themselves evidence of

23 ¹ Where, as here, documents received in discovery are filed in conjunction with a motion that is "more than
 24 tangentially related to the merits of the case," *Ctr. for Auto Safety v. Chrysler Grp., LLC*, 809 F.3d 1092, 1101 (9th
 25 Cir. 2016), these documents "become part of the judicial record," *Pintos v. Pac. Creditors Ass'n*, 605 F.3d 665, 678
 (9th Cir. 2010).

² *Ctr. for Auto Safety v. Chrysler Grp., LLC*, 809 F.3d 1092, 1102 (9th Cir. 2016).

26 ³ The scope of disputed materials has narrowed since Microsoft's November 29, 2017 filing. *See* Declaration of
 Anne B. Shaver ("Shaver Decl."), filed herewith, ¶5.

1 systemic gender discrimination and are relevant to understanding the parties' approaches to the
 2 data analysis at class certification in this case. Plaintiffs' request to unseal should be granted.⁴

3 **II. LEGAL STANDARD**

4 **A. The "Compelling Reasons" Standard Applies to Sealing Here.**

5 Courts addressing sealing requests "start with a strong presumption in favor of access to
 6 court records." *Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1136 (9th Cir. 2003).
 7 This is because "[i]t is clear that courts in this country recognize a general right to inspect and
 8 copy public records and documents, including judicial records and documents." *Nixon v. Warner*
 9 *Comms., Inc.*, 435 U.S. 589, 597 (1978). The presumption of public access "promot[es] the
 10 public's understanding of the judicial process and of significant public events," *Valley Broad.*
 11 *Co. v. U.S. Dist. Ct.*, 798 F.2d 1289, 1294 (9th Cir. 1986).

12 Whereas some lower courts previously employed a "good cause" standard to sealing
 13 requests connected to non-dispositive motions, in 2016 the Ninth Circuit found that was in error.
 14 *Chrysler*, 809 F.3d at 1098-02. In *Chrysler*, the Court held the "compelling reasons" standard
 15 applies to sealing requests associated with any motion that is "more than *tangentially* related to
 16 the merits of the case." *Id.* at 1101 (emphasis added). Analysis of a motion for class certification
 17 under Federal Rule of Civil Procedure 23 "will entail some overlap with the merits of the
 18 plaintiff[s'] underlying claims[s]." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 351 (2011).
 19 Consequently, "[s]ince the Ninth Circuit's decision in *Center for Auto Safety v. Chrysler Group*,
 20 district courts considering the question have found that a motion for class certification is 'more
 21 than tangentially related to the underlying cause of action' and therefore merits application of the
 22 'compelling reasons' standard." *Phillips v. Ford Motor Co.*, No. 14-2989, 2016 WL 7374214, at
 23 *2 (N.D. Cal. Dec. 20, 2016) (collecting cases and applying "compelling reasons" to motion for

24
 25 ⁴ For the Court's reference, the specific docket entries and the parties' respective positions on each item are set forth
 26 in the accompanying Shaver Declaration. In addition, Plaintiffs have prepared a visually-friendly graphic, *see id.*,
 Ex. A, showing side-by-side the difference that would occur between sealing and unsealing the material at issue to
 the few pages where these materials are cited in Plaintiffs' brief.

1 class certification).⁵

2 To satisfy the “compelling reasons” standard, the party seeking to seal a document must
 3 “identify the specific harm that would come from disclosure . . . to justify sealing.” *Cryer*, 2017
 4 WL 4023149, at *3. The proponent of sealing must provide sufficient evidence to a court so that
 5 it may “articulate[] compelling reasons supported by factual findings,” *Foltz*, 331 F.3d at 1135,
 6 showing the specific harm that would result from public disclosure with more than “hypothesis
 7 or conjecture,” *Kamakana v. Honolulu*, 447 F. 3d 1172, 1179 (9th Cir. 2006).⁶ Courts then
 8 “conscientiously balance[] the competing interests of the public and the party who seeks to keep
 9 certain judicial records secret,” considering whether the information at issue will “promote
 10 public scandal, circulate libelous statements,” or result in disclosure of “business information
 11 that might harm a litigant’s competitive standing.” *Chrysler*, 809 F.3d at 1097 (quotations
 12 omitted). Of note, “[t]he mere fact that the production of records may lead to a litigant’s
 13 embarrassment, incrimination, or exposure to further litigation will not, without more, compel
 14 the court to seal its records.” *Kamakana*, 447 F.3d at 1179.

15 **B. In Arguing for a “Good Cause” Standard, Microsoft Misrepresents the Law.**

16 In an effort to subject its sealing requests to the less burdensome “good cause” standard,
 17 Microsoft has misrepresented the law, including a decision of this Court. Preliminarily,
 18 Microsoft provides an inaccurate summary of the Ninth Circuit’s decision in *Chrysler*,
 19 erroneously citing it for the proposition that the “good cause standard applies” when the matter

20 ⁵ See also *Baker v. SeaWorld Enter., Inc.*, No. 14-2129, 2017 WL 5029612, at *3 (S.D. Cal. Nov. 3, 2017) (applying
 21 “compelling reasons” standard to sealing requests associated with motion for class certification); *Christopher*
 22 *Corcoran v. CVS Health*, No. 15-3504, 2017 WL 3873709, at *1 n.1 (N.D. Cal. Sep. 5, 2017) (same) (see also ECF
 23 No. 331 in 15-3504); *Cryer v. Franklin Templeton Res., Inc.*, No. 16-4265, 2017 WL 4023149, at *2 (N.D. Cal. July
 24 26, 2017) (same); *Opperman v. Path, Inc.*, No. 13-453, 2017 WL 1036652, at *3 (N.D. Cal. Mar. 17, 2017) (same) ;
 25 *Lucas v. Breg, Inc.*, No. 15-258, 2016 WL 5464549, at *1 (S.D. Cal. Sep. 28, 2016) (same); *In re Google Gmail*
 26 *Litig.*, 13-MD-2430, 2014 WL 10537440, at *4 (N.D. Cal. Aug. 6, 2016) (same); *Shahinian v. Kimberly-Clark*
Corp., No. 14-8390, 2016 WL 7177533, at *1 (C.D. Cal. July 29, 2016) (same); *Cohen v. Trump*, No. 13-2519, 2016
 WL 3036302, at *3 (S.D. Cal. May 27, 2016) (same); *Prime Healthcare Centinela, LLC v. Kimberly-Clark Corp.*,
 No. 14-8390, 2016 WL 7177531, at *2 (Mar. 24, 2016) (same).

⁶ The Western District of Washington Local Rule echoes this standard, requiring a proponent of sealing to explain:
 the legitimate private or public interests that warrant the relief sought; the injury that will result if the relief sought is
 not granted; and why a less restrictive alternative to the relief sought is not sufficient. W.D. Wash. L.R. 5(g)(3)(B).

1 before the court “is a non-dispositive motion.” Microsoft’s Resp. at 2, Dkt. 269. In fact, *Chrysler*
 2 states just the opposite. The Ninth Circuit made clear that *Chrysler* represented a turning point in
 3 the law on sealing, yet Microsoft cites to 13 cases decided *before Chrysler*. Resp. at 2-4.

4 Microsoft cites to only three cases decided after *Chrysler*, and the citation to each is
 5 misleading. In *Bund v. Safeguard Properties*, No. 16-920, ECF No. 89, at 3 (W.D. Wash. July 5,
 6 2017), a case before this Court, Microsoft misrepresents the argument section of a stipulated
 7 motion to seal as the opinion of the Court. Resp. at 3. While in *Bund* the parties requested that
 8 the Court apply the “good cause” standard, there is no holding endorsing the parties’ argument.⁷
 9 *Id.* Instead, the Court’s one-sentence order merely reflects that the Court granted the parties’
 10 joint request to seal certain documents. *Id.* at 11. The two other post-*Chrysler* cases that
 11 Microsoft cites—*Kautzman v. Carrington Morg. Servs., LLC*, No. 16-1940, ECF No. 51 (W.D.
 12 Wash. Sep. 19, 2017), and *Stoba v. Saveology.com, LLC*, No. 13-2925, 2016 WL 1257501, at *2
 13 (S.D. Cal. Mar. 31, 2016)—do not even mention *Chrysler* at all, much less distinguish it.
 14 *Kautzman* and *Stoba* therefore cannot be construed as alternative lower-court applications of
 15 *Chrysler* to the standard for sealing at the class certification stage. Simply put, contrary to
 16 Microsoft’s contention, the “compelling reasons” standard applies to motions to seal associated
 17 with motions for class certification.

18 **III. ARGUMENT**

19 **A. Microsoft Has Provided No Reason For Sealing The Number of Complaints.**

20 Microsoft’s proposed redactions to Plaintiffs’ class certification brief include the number
 21 of internal complaints of gender discrimination and sexual harassment filed during the class
 22 period, as well as the number of times Microsoft concluded the complaints were substantiated.⁸
 23 Yet in its Response, Microsoft argues only that the names and other identifying information of
 24 third parties should be redacted from the internal complaint files (Resp. at pp.5-7), a position

25 ⁷ Furthermore, the parties in *Bund* stipulated that “compelling reasons” and “good cause” existed to seal the material
 at issue. *Bund v. Safeguard Props., LLC*, No. 16-920, ECF No. 89, at 9 (W.D. Wash. July 5, 2017).

26 ⁸ See Shaver Decl., Ex. A at 2:13-14; 21:17-22:2; 23:24-24:2; and 24:6-7.

1 joined by Plaintiffs. Microsoft has not asserted any justification, let alone a compelling reason,
 2 for sealing the contested information, nor could it. The only potential harm to Microsoft is
 3 embarrassment or incrimination, which the Ninth Circuit has held is not a justification to seal
 4 material in which the public has an interest. *Kamakana*, 447 F.3d at 1179. Here, as with the
 5 allegations in the complaints – which Microsoft concedes should be unsealed – the overall
 6 numbers of complaints and the number Microsoft upheld are relevant to understanding Plaintiffs’
 7 intentional discrimination claims, and should be made public.

8 **B. Microsoft Has Not Shown that Compelling Reasons Support Sealing Human**
 9 **Resources Communications about Diversity Initiatives and Strategies.**⁹

10 Microsoft seeks to seal a collection of human resources communications reflecting
 11 internal concerns about the shortcomings of its diversity and inclusion programs.¹⁰ Microsoft
 12 makes two unsupported, hypothetical arguments with respect to these materials. First, it asserts
 13 that competitors could use this information in recruiting efforts against the company. Dkt. 272, ¶
 14 5. Yet Microsoft presents no specific examples of how this material could be used in this way. If
 15 Microsoft is suggesting that competitors with a greater commitment to diversity might take
 16 advantage of Microsoft’s lack of success in this area, that does not create a compelling reason to
 17 hide Microsoft’s shortcomings – indeed, shortcomings that are the subject of this class action.
 18 Second, Microsoft asserts that the information could be misconstrued to make “uninformed
 19 conclusions about the cause, meaning, or significance” of the information, which could
 20 “improperly confuse and/or influence Microsoft’s customers, employees, or potential employee
 21 applicants.” *Id.* This justification merely suggests that Microsoft finds the content of these
 22 documents embarrassing and does not want its customers, employees, or potential employees to
 23 see them. That is not a compelling reason, let alone evidence of a “specific harm,” *Cryer*, 2017

24 ⁹ While Plaintiffs do not agree that sealing is appropriate for any of the underlying diversity and inclusion
 25 documents, because the public interest in disclosure is strongest with respect to Plaintiffs’ Class Certification Brief,
 26 Plaintiffs submit that the Court could alternatively unseal only the references to these documents cited within the
 brief itself and defer the question of unsealing the complete documents attached in the file for later in the case, if
 appropriate.

¹⁰ See Shaver Decl. Ex. A at 14:8; 16:4-10; 17:8-26; 18:3-26; 21:2-4; 27:15-24; 28:3-15.

1 WL 4023149, at *3, that would justify denying the well-recognized public right of access to
2 judicial documents.

3 **C. The OFCCP's Notices of Violation Should Be Unsealed.**

4 Although the fact that the OFCCP investigated Microsoft and issued Notices of Violation
5 ("NOVs") is already public, Microsoft maintains that the NOVs and discussion thereof in the
6 brief should be sealed.¹¹ However, the only justification Microsoft asserts for sealing is that
7 disclosure of the NOVs could harm the government's investigation. Yet when Plaintiffs asked
8 the OFCCP about this dispute, the agency stated that it was aware of the motion to seal and
9 would not file a motion to intervene here.¹² Microsoft's assertion that ongoing DOL
10 investigations are exempt under FOIA § 7(a) is irrelevant here. The government may well have a
11 compelling interest in exempting on-going investigations from disclosure, whether the request be
12 from parties under investigation who might be trying to learn about and quash government audits
13 mid-stream or from non-parties poking around DOL investigations for any number of reasons
14 unrelated to DOL's mission. Here, the NOVs have already been issued to Microsoft, and
15 Microsoft does not assert any reason why public disclosure could possibly harm an investigation
16 which already determined that violations occurred. By contrast, the public has a significant
17 interest in these materials. The OFCCP is charged with enforcing the anti-discrimination laws
18 with respect to companies that receive federal contracts – *e.g.*, taxpayer money. If the agency has
19 found that a government vendor is non-compliant, the public has a right to know. In addition, the
20 public right of access is strong here because the NOVs contain information that is relevant to
21 Plaintiffs' claim that Microsoft has maintained a continuing pattern and practice of gender
22 discrimination, as well as to the parties' arguments as to the proper statistical analyses.

23 **IV. CONCLUSION**

24 For the reasons stated above, Plaintiffs respectfully request the Court unseal as described.

25 ¹¹ See Shaver Decl., Ex. A at 11:12-15; 11:19-13:2.

26 ¹² Shaver Decl., ¶ 4.

1
2 Dated: December 8, 2017

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing and all documents attached hereto were served December 8, 2017 upon counsel of record via service by ECF.

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